UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 18 – SUBREGION 30

NESTLÉ USA, INC.

And **Cases 18-CA-231008**

TOU VANG, an Individual

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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ATTORNEYS FOR NESTLÉ USA, INC.

Dated: April 29, 2020

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I. STATEMENT OF THE CASE

A. Overview

Charging Party, Tou Vang, is a former factory employee at Respondent, Nestlé USA, Inc.'s Little Chute, Wisconsin facility. In May 2018, Charging Party alleged another employee at Respondent, Jack Lee, made a racist comment directed at African American employees. Respondent promptly investigated Charging Party's allegations. Respondent interviewed multiple witnesses, received multiple statements, and provided Charging Party an opportunity to respond to the information it received. Based on the information and evidence Respondent received through its investigation, Respondent concluded that Charging Party fabricated the allegation of a racist comment to cause Respondent to terminate Mr. Lee's employment so Charging Party could take his position.

Charging Party's May 2018 allegation was not his first complaint against Mr. Lee. In February 2018, Charging Party participated in a group petition presented to Respondent concerning how Mr. Lee treated his co-workers. Respondent investigated the claims in the petition, determined there was merit to some of the allegations against Mr. Lee, suspended and

disciplined Mr. Lee, and advised the petitioning employees that it took corrective action that would include counseling to improve Mr. Lee's conduct.

During the course of Respondent's February 2018 investigation into Mr. Lee's conduct at work, Charging Party presented a statement that alleged Mr. Lee referred to employees as monkeys. However, Charging Party did not allege any racial aspect to this comment or that he had any knowledge of the persons referenced by Mr. Lee. Instead, he presented it as another derogatory remark by Mr. Lee. Yet, after Respondent advised Charging Party and other employees that it was correcting and counseling Mr. Lee, without terminating him, Charging Party began to aggressively pursue further action against Mr. Lee without any new purported conduct by Mr. Lee to support additional discipline against him.

Charging Party changed his prior allegation against Mr. Lee and alleged Mr. Lee specifically targeted African American employees with his "monkeys" comment. Indeed, Charging Party acknowledged after Mr. Lee's suspension that he had no new concerns with Mr. Lee's conduct at work. However, with Charging Party's changed allegation, Respondent began a new investigation into Mr. Lee's alleged monkeys comment.

During the investigation, Charging Party's co-workers volunteered information that demonstrated Charging Party had no direct knowledge of Mr. Lee's purported comment and completely fabricated that it was directed towards African American employees. Respondent learned in the investigation that Charging Party was motivated to create a story about heinous behavior by Mr. Lee in order to get him fired and thereby make his job available for the taking. Thus, Respondent provided Charging Party an opportunity to respond to the information it received concerning his motive for raising the allegations against Mr. Lee, and Charging Party chose to stay silent. Respondent therefore concluded the unrebutted allegations against Charging

Party and his motive to fabricate a story were true. Consistent with the long line of employees who Respondent learned violated its policy prohibiting dishonesty in the workplace, Respondent terminated Charging Party's employment for lying.

B. Summary of Facts

1. Respondent's Business and Policies.

Respondent maintains an Equal Employment Opportunity Policy that prohibits unlawful discrimination on the basis of race, creed, color, religion, sex, national origin, immigration status, ancestry, age, marital status, protected veteran status, disability or perceived disability, medical conditions, genetic information, sexual orientation, gender identity, or any other protected status recognized by law. (Tr. 243-244; Resp. Ex. 2.)[1] Under the policy, Respondent directs employees to promptly report discrimination to their manager, Respondent's Human Resources department, or any member of management. (*Id.*) Respondent not only requires employees to report unlawful discrimination and/or harassment, but it also prohibits retaliation against employees who make complaints or participate in the investigation process in good faith. (Tr. 244-245; G.C. Ex. 20.)

Additionally, Respondent maintains Disciplinary Guidelines that notify employees of the type of misconduct that Respondent considers serious in nature and that employees can expect to result in immediate discharge. (Tr. 245-246; G.C. Ex. 19.) Included in the list of examples of misconduct that may lead to immediate discharge, regardless of prior warnings, is dishonesty. (*Id.*)

Charging Party held the position of Product/Bakery Support at Respondent. (Resp. Ex. 1.) This position required Charging Party to supply raw edible and non-edible materials to Respondent's production and bakery lines. (Tr. 242; Resp. Ex. 1.) He moved finished product to

[1] References to the hearing transcript are identified by page number as "Tr. ___." References to the exhibits admitted into evidence by the ALJ at the hearing are identified by Respondent exhibit number as "Resp. Ex. ___" and by General Counsel exhibit number as "G.C. Ex. ___."

and from Respondent's freezers and coolers to its warehouse using a forklift. (*Id.*) Charging Party acknowledged his obligation to read, understand, and adhere to Respondent's employee handbook and the Company policies contained in it multiple times during his employment, including on February 3, 2010, March 8, 2011, and May 11, 2015. (Tr. 258-260; Resp. Ex. 6.)

Charging Party worked with Jack Lee, Respondent's Line Coordinator. This position was in charge of assisting the Team Leader with daily responsibilities on the assigned line. (Tr. 262-263; Resp. Ex. 7, at 1.) However, this position had no supervisory responsibilities. (Resp. Ex. 7, at 2.) That is, Mr. Lee did not have authority to hire or fire employees, excuse employees from work, issue discipline to employees, or direct the work of other employees. (Tr. 263-264.)

Mr. Lee also held the position of Backup Team Leader at Respondent. (Tr. 264-265; Resp. Ex. 8.) Like the Line Coordinator position, this role does not have authority to hire or fire employees, excuse employees from work, issue discipline to employees, or direct the work of other employees. (Tr. 265-266.)

2. Respondent Investigates Employee Allegations Against Mr. Lee After It Received a February 7, 2018 Employee Petition.

On or about February 7, 2018, Charging Party submitted a petition to Respondent regarding Mr. Lee (the "February 2018 petition"). (G.C. Ex. 2.)[2] The petition provide multiple examples of Mr. Lee's purported mistreatment of other employees, including that he called co-workers "stupid and dumb." (*Id.*)

However, the petition did not include any description of alleged conduct by Mr. Lee that would become central to Charging Party's subsequent conduct. The petition did not make any reference to calling employees monkeys. (*Id.*) The petition did not allege Mr. Lee engaged in racial

[2] Unless otherwise indicated, all dates referring to events relevant to this matter occurred in 2018.

misconduct. (*Id.*) The petition made no mention of Mr. Lee calling a group of African American employees monkeys. (*Id.*)

Holly Rajchel, Respondent's Human Resources Manager, provided the petition to Ms. Sipiorski, Respondent's Human Resources Generalist. (Tr. 266-267.) Ms. Rajchel also gave Ms. Sipiorski a statement signed by Ashley Schmitt and a petition against See Yang, Respondent's Backup Line Coordinator. (Tr. 268; G.C. Ex. 3 and 11.) Ms. Rajchel asked Ms. Sipiorski to conduct an investigation into the allegations against Mr. Lee. (Tr. 268-269.)

After Ms. Sipiorski received the petition, she directed Neil Scullion, Respondent's Human Resources Representative, to meet with Mr. Lee when he was next scheduled to work, obtain a statement from him regarding the allegations, and then suspend him while Respondent completed its investigation. (Tr. 270; G.C. Ex. 22.)

Ms. Sipiorski also directed Mr. Scullion to obtain statements from the employees who signed the petition addressing Mr. Lee's conduct. (Tr. 271.) Mr. Scullion subsequently submitted statements to Ms. Sipiorski completed by all of the employees who signed the petition against Mr. Lee, including, but not limited to, Sydney Vang, Chong Vang Thao, Ger Vang, Ashley Schmitt, Dao Xiong, and Charging Party. (Tr. 271-274, 278, 282-285; G.C. Ex. 5, 12, 23, 24, 25, 27, 49.) Ms. Sipiorski reviewed these statements as part of her investigation. (*Id.*)

Ms. Sipiorski also received in her mailbox and reviewed as part of her investigation individual statements from Charging Party and Mr. Thao. (Tr. 275-276; G.C. Ex. 4 and 26.) Charging Party's statement described, "[W]as eating lunch one night, heard [C]hong [T]hao mention that Jack [Lee] said he put three monkeys on bins and they can't even do it." (G.C. Ex. 4.)[3] Charging Party did not identify in this statement to whom Mr. Lee directed the "monkey"

[3] The receipt and review of this statement demonstrates that, contrary to the judge's decision, Respondent investigated the purported monkey comment when it reviewed Mr. Thao's statement. (Exception 6.)

comment or any other details to suggest it was a race-related remark. (*Id*.) Neither the petition signed by multiple employees nor Mr. Thao's individual statement described this "monkey" comment. (*See* G.C. Ex. 1 and 26.)

Ms. Sipiorski also received a statement by e-mail from Anthony Burke, Respondent's Team Leader, which supported Mr. Lee. (Tr. 279-280; Resp. Ex. 11.) However, Ms. Sipiorski disregarded Mr. Burke's statement and deemed it to be irrelevant because he was not identified as a witness in the employee petition or by any of the witness statements. (Tr. 279-280.)

3. Respondent Concludes Its Investigation Into the Allegations Raised Against Mr. Lee by Issuing Him a Disciplinary Warning, Performance Coaching Plan and Unpaid Suspension.

On February 15, 2018, at the conclusion of her investigation, Ms. Sipiorski reviewed the statements Respondent obtained from the employees who signed the petition concerning Mr. Lee's conduct and the documentation related to follow-up interviews taken from witnesses. (Tr. 285.) Ms. Sipiorski documented her analysis based on the information and evidence she received through the investigation. (Tr. 285-287; Resp. Ex. 12.) Ms. Sipiorski determined that Respondent did not receive evidence that Mr. Lee violated its lockout/tagout policy, but she believed that Respondent should provide him coaching on that subject. (*Id*.) Further, Ms. Sipiorski concluded that Mr. Lee used inappropriate language that was disrespectful towards others. (*Id*.) Based on Mr. Lee's lack of prior discipline, Ms. Sipiorski recommended that Mr. Lee return to work with a verbal warning and no pay for his suspension time. (*Id*.) Ms. Sipiorski then discussed her findings and conclusions with Ms. Rajchel. (Tr. 287.) Ms. Sipiorski did not recommend, and Respondent did not issue, any discipline for the employees who signed the petition regarding Mr. Lee's conduct. (Tr. 298-299.)

On February 16, 2018, after Respondent concluded its investigation, Ms. Sipiorski and Rusty Radmer, Respondent's Human Resources Generalist, met with Mr. Lee. (Tr. 288-291; G.C.

Ex. 31; Resp. Ex. 13.) During this meeting, Ms. Sipiorski reviewed Respondent's investigation, the behaviors that Respondent determined Mr. Lee needed to correct, and the coaching that Respondent would provide him. (Tr. 289-290.) Ms. Sipiorski also issued Mr. Lee a Corrective Action Form that memorialized Respondent's concerns and discipline. (Tr. 291, Resp. Ex. 13.)

On February 21, 2018, Ms. Sipiorski met with the employees who signed and submitted the petition related to Mr. Lee's conduct at Respondent, including Charging Party. (Tr. 294-295; G.C. Ex. 50.) When employees arrived to the meeting, Ms. Sipiorski asked them to review and sign a sign in sheet. (G.C. Ex. 50.) The sign in sheet stated at the bottom of the page, "By signing this sign in sheet, I agree to wear a unicorn suit and bake cookies for my line." (*Id*.) Ms. Sipiorski added this statement to the sign in sheet because she learned during her investigation that multiple employees had to ask to see a copy of the February 2018 petition during their interviews because they did not know what it contained when they signed it. (Tr. 296.) Ms. Rajchel instructed Ms. Sipiorski to include this statement to illustrate to the employees the importance of understanding and knowing the content to which one signs their name because it can have significant ramifications. (Tr. 296-297.)[4]

Ms. Sipiorski told the employees that Respondent reviewed their complaints, their concerns were valid, Respondent took action to respond, that Mr. Lee was suspended,[5] and he would be returning from suspension. (Tr. 295, 381.) Ms. Sipiorski also encouraged everyone to immediately report any issues they may experience in the future because some of the events described by employees occurred long before their petition to Respondent. (Tr. 157, 295-296.) Ms. Sipiorski

[4] The judge repeatedly and wrongly referred to this statement as a "joke" throughout his decision. There was no testimony by any Respondent witness that the intent of the statement was anything other than a serious attempt to impress upon employees that they should be certain of the allegations to which they represent as true by their signature because of the serious consequences their statements could have on another co-worker. (Exception 5.)
[5] (Exception 4.)

also responded to the concerns raised by a couple of employees who were upset about the statement at the bottom of the sign in sheet, explaining that it was not Respondent's intent to make them upset. (Tr. 298.)

4. Charging Party Complains of the Investigation Outcome to Respondent.

On March 1, 2018, Marcus Brenneman, Respondent's Factory Manager, met with Charging Party at Charging Party's request. (Tr. 157-158, 457-458.) During this meeting, Charging Party told Mr. Brenneman that Mr. Lee was not a good worker, Mr. Lee did not treat people right, Mr. Lee was a bad person as evidenced by his failure to attend his father's funeral, and he requested that Respondent terminate Mr. Lee's employment. (Tr. 458-459.) In this meeting, Charging Party alleged for the first time that Mr. Lee called African Americans at the facility monkeys. (Tr. 458.) He had not previously described that the purported monkey comment was race-related or directed at any employees in particular. (G.C. Ex. 1 and 4.) Charging Party also told Mr. Brenneman that he was frustrated about how Respondent's Human Resources handled the employee petition regarding Mr. Lee. (Tr. 459.)

While Charging Party spoke to Mr. Brenneman about his concerns, he (Charging Party) appeared visibly upset to Mr. Brenneman, and Mr. Brenneman thought the level of emotionality was odd under the circumstances. (Tr. 459.) Because of Charging Party's level of emotionality, and because Charging Party mentioned personal issues from outside of work, such as Mr. Lee not attending his father's funeral, Mr. Brenneman suspected there was something other than workplace issues motivating Charging Party. (Tr. 459.) Mr. Brenneman told Charging Party that he would look into the concerns he raised related to the investigation into Mr. Lee. (Tr. 460-461.)

The following day, Mr. Brenneman met with Ms. Rajchel and Ms. Sipiorski to review Respondent's investigation into Mr. Lee's conduct. (Tr. 300-301, 461-462.) After reviewing the information and materials received by Ms. Sipiorski, Mr. Brenneman concluded that Respondent

acted appropriately in its response to the February 2018 petition against Mr. Lee. (Tr. 465.) He then directed Ms. Sipiorski to advise Charging Party that he (Mr. Brenneman) reviewed the investigation and decided to support the decision to return Mr. Lee to work. (Tr. 465-466.)

Ms. Sipiorski subsequently met with Charging Party and explained to him that Respondent reviewed the investigation. (Tr. 301-302.)[6] Ms. Sipiorski urged Charging Party to report and bring forward any new concerns he had regarding Mr. Lee's conduct. (*Id*.) During their conversation, Charging Party specifically raised his concern with Mr. Lee and his lockout/tagout actions. (Tr. 302.) Ms. Sipiorski explained to Charging Party that Respondent's safety department reviewed the allegation and did not find any proof of a violation. (Tr. 302.) This allegation was not new information as Respondent received it in the employee petition and addressed it in the initial investigation. (Tr. 303; G.C. Ex. 1.) However, Charging Party's repeated allegation against Mr. Lee was significant because any such violation would have resulted in his immediate termination. (Tr. 302-303.) Ms. Sipiorski also asked Charging Party about his experience with Mr. Lee on the floor since Mr. Lee returned to work, and Charging Party reported that everything was fine. (*Id*.)

5. Charging Party Relies on his Past Allegations in a May 9, 2018 Complaint Against Mr. Lee.

Months later, on May 9, 2018, Justin Preisler, Respondent's Production Manager, met with Charging Party and Sydney Vang at Charging Party's request. (Tr. 475-476; G.C. Exs. 43-44.) Jon Balakrishan, Respondent's Supervisor who reports to Mr. Preisler, communicated Charging Party's request to meet with Mr. Preisler and attended the meeting. (Tr. 475.) During this meeting, Charging Party told Mr. Preisler that another employee heard Mr. Lee refer to black employees that worked on the line as "monkeys." (Tr. 477.) Additionally, Charging Party told Mr. Preisler

[6] The judge's decision relies on Charging Party's version of events that took place during this discussion without explaining why he credited him over Ms. Sipiorski. (Exception 7.)

that Xe Xiong, another employee at Respondent, signed the February 2018 petition against Mr. Lee and encouraged Charging Party to prepare a petition against Donna Tarkowski, Respondent's Team Leader, because she is racist. (Tr. 88, 477.)

The following day, May 10, 2019, Mr. Preisler told Ms. Sipiorski about his meeting with Charging Party and Sydney Vang and provided her with his handwritten notes from it. (Tr. 305-306, 478; G.C. Exs. 43 and 44.) Mr. Preisler then prepared an organized, typewritten version as a more legible format at her request. (*Id*.) Based on this new information, Ms. Sipiorski began another investigation into Mr. Lee's conduct and suspended Mr. Lee pending its completion. (Tr. 307.)

The same day, Ms. Sipiorski received a forwarded e-mail from Mr. Balakrishan, Mr. Lee's supervisor, which he received from Mr. Lee. (Tr. 319; Resp. Ex. 17.) In this e-mail, Mr. Lee reported that Charging Party confronted a coworker named Masomo Rugama, who is black, and told him "about [Mr. Lee] calling names and calling people at the bins [m]onkeys . . . about a year ago when [Mr. Lee] had three Swahili over by the bins." (Resp. Ex. 17; see also Tr. 468.) After Ms. Sipiorski reviewed the e-mail she received from Mr. Balakrishan, she became concerned about the integrity of the planned investigation into Mr. Lee's conduct that was based on Charging Party's allegations. (Tr. 319.) Specifically, Ms. Sipiorski wanted to determine what incidents the identified witnesses actually had observed, versus what they merely were told by Charging Party. (*Id*.)

Additionally, on May 10, 2018, Ms. Sipiorski received a log created by Chong Vue, Respondent's Backup Line Coordinator that raised Ms. Sipiorski's concerns for Charging Party's motivation in making another complaint against Mr. Lee. (Tr. 308; Resp. Ex. 19.) On Mr. Vue's log, Ms. Sipiorski noticed a statement identified as occurring on May 8, 2018, which described,

"Susan also said that [Charging Party] and Sydney are still mad and not over the Jack situation and are looking at us to see the 1st thing we do wrong to report us." (Tr. 309; Resp. Ex. 19.) Based on this statement, Ms. Sipiorski was concerned that Charging Party was looking for any reason to make a report against Mr. Lee because he was not happy with the outcome of Respondent's investigation into the February 2018 petition. (Tr. 309.) A statement Ms. Sipiorski received from Mr. Burke the same day regarding his interaction with Mr. Vue confirmed her concern. (Tr. 317; Resp. Ex. 20.)

To investigate Charging Party's allegation against Mr. Lee, Mr. Preisler and Mr. Scullion planned to interview potentially relevant witnesses. (Tr. 481.) Due to the information they received that Charging Party may have attempted to influence Mr. Rugama as a witness, Mr. Preisler and Mr. Scullion met with Mr. Rugama on the night of May 10. (Tr. 185-186, 481-484.) During their discussion, Mr. Rugama told Mr. Preisler and Mr. Scullion that Charging Party told him that Mr. Lee called him (Mr. Rugama) and two other employees working on blue bins[7] "monkeys." (Tr. 187-188.) However, Mr. Rugama confirmed he did not have any personal knowledge of Mr. Lee calling him a monkey and did not have any knowledge that Charging Party's allegation was true. (Tr. 187-188, 485.) Mr. Rugama explained that Charging Party first told him about this alleged comment by Mr. Lee two or three months earlier. (Tr. 193-194.) Charging Party again approached Mr. Rugama after his first break during work on May 9, 2018, to remind him of that prior conversation and inform him that Mr. Preisler or another Respondent representative may question him about it.[8] (Tr. 193-194, 485) Charging Party was the only individual to tell Mr. Rugama that

[7] Mr. Rugama worked on the blue bins once or twice a month while he was in general labor. (Tr. 209.) When completing this work, he normally worked with one other employee but sometimes there were three employees working on the blue bins together. (*Id*.) More employees work on the blue bins when the product is more likely to cause jams in the production machinery, including, but not limited to, Margherita Square pizzas. (Tr. 209-210.)

[8] The Administrative Law Judge should reject any attempt by the General Counsel to discredit Mr. Rugama's testimony through his prior affidavit. It was clear at the hearing that the General Counsel's questioning of Mr. Rugama based on this affidavit confused him as she referenced paragraph numbers when the document contained paragraph,

Mr. Lee allegedly had made a monkey comment. (Tr. 208.) Mr. Rugama provided Mr. Scullion a statement summarizing his interactions with Charging Party concerning the purported monkey comment by Mr. Lee, which Ms. Sipiorski later reviewed as part of her investigation. (Tr. 184-185, 188-189, 338; G.C. Ex. 13.)

After Mr. Preisler and Mr. Scullion met with Mr. Rugama, they conferred with Ms. Sipiorski about the meeting. (Tr. 486.) Based on the information received from Mr. Rugama, Mr. Preisler, Mr. Scullion, and Ms. Sipiorski decided to suspend Charging Party to conduct a comprehensive and fair investigation without him "planting" testimony with respect to his co-workers. (Tr. 319-320, 486.) The investigators sought to give employees a chance to provide their statements to Respondent without influence or tampering by another individual. (Tr. 319-320, 487.) Charging Party's suspension pending investigation was consistent with Respondent's past practice in such workplace investigations. (Tr. 487.)

Ms. Sipiorski later received a statement dated May 10, 2018 from Victor Onyango, a former employee on Respondent's bakery lines. (Tr. 333; Resp. Ex. 25.) Respondent obtained this statement because Mr. Rugama's statement identified Mr. Onyango as another individual to whom Charging Party had spoken about Mr. Lee calling African American employees "monkeys." (Tr. 333-334.) Mr. Onyango's statement recalled that Charging Party told him that Mr. Lee called African American employees monkeys. (Resp. Ex. 25.)

Mr. Preisler and Mr. Scullion then met with Charging Party in a conference room at the facility to inform him of his suspension. (Tr. 488-489.) Mr. Preisler explained to Charging Party that Respondent learned he had talked to Mr. Rugama about the subject matter of its investigation concerning Mr. Lee and that his behavior impeded Respondent's ability to conduct a fair,

page, and line numbers. Additionally, Mr. Rugama explained that English is not his native language and the General Counsel failed to clearly articulate her document references for him. (Tr. 189, 210-211.)

comprehensive investigation. (*Id*.) Mr. Preisler asked Charging Party if he went to the cartoner room to speak to Mr. Rugama after their conversation on May 9, 2018, and Charging Party responded in the negative. (Tr. 489.) However, Charging Party had, in fact, spoken to Mr. Rugama immediately after the meeting, but he did not provide Mr. Preisler and Mr. Scullion with that information. (Tr. 137-138.) At Mr. Preisler's and Mr. Scullion's request, Charging Party then completed and submitted a written statement. (Tr. 489; G.C. Ex. 7.) When Mr. Preisler subsequently escorted Charging Party from the facility, Charging Party commented about being suspended for standing up for other employees. (Tr. 491.) Mr. Preisler explained that Respondent was not suspending Charging Party for standing up for other employees but rather because he was impeding Respondent's investigation into the allegations against Mr. Lee. (Tr. 491.)

After Charging Party left Respondent's facility, Mr. Preisler and Mr. Scullion met with Chong Thao. (Tr. 492.) During that meeting, at Mr. Preisler's and Mr. Scullion's request, Mr. Thao completed a written statement regarding what he may have heard Mr. Lee say to describe African American employees. (Tr. 493; G.C. Ex. 35.) Mr. Thao's statement confirmed he heard Mr. Lee say the word "monkey" but did not indicate to whom, if anyone, Mr. Lee referred. (G.C. Ex. 35.)

Mr. Preisler then met with Xe Xiong. (Tr. 494-495.) Mr. Scullion recused himself from this meeting due to his working relationship with Ms. Xiong's son. In his place, another Supervisor, Ben Schwartz, attended. (Tr. 495-496.) Additionally, Ms. Xiong's co-worker, Thae Yang, acted as a translator during this meeting. (Tr. 495.) During their discussion, Ms. Xiong did not recall stating to anyone that Ms. Tarkowski was racist but directed Respondent to Mai Xiong as someone who may have more information on the subject. (Tr. 497.)[9] As part of her investigation,

[9] The judge inconsistently credited Ms. Xiong's credibility at parts of her testimony but discredited it and found her "unreliable" as to whether she ever spoke to Charging Party about Turkowski without explaining his evaluation of her demeanor, which is reversible error. (Exception 2.)

Ms. Sipiorski reviewed Ben Schwartz's notes regarding this meeting, as well as a statement from Mai Xiong. (Tr. 342-44, Resp. Ex. 31; G.C. Ex. 45.)

That same evening, Mr. Preisler and Mr. Scullion also met with Mr. Lee. (Tr. 499.) Mr. Lee emphatically denied calling any employees monkeys. (Tr. 499.) Mr. Preisler believed Mr. Lee's denial was genuine. (Tr. 499.) Mr. Preisler and Mr. Scullion concluded the discussion by asking Mr. Lee to submit a written statement, which he provided to them. (Tr. 500; G.C. Ex. 33.) In light of the seriousness and severity of the allegations against Mr. Lee, in fairness to Charging Party, and to ensure Respondent could carry out its investigation unimpeded and without risk of witness tampering, Mr. Preisler and Mr. Scullion, at Ms. Sipiorski's direction, suspended Mr. Lee from work at Respondent until Respondent completed its investigation. (Tr. 307-308, 500-501.)

The following day, May 11, 2018, Ms. Sipiorski also received a handwritten statement submitted by Chong Vue. (Tr. 339; Resp. Ex. 29.) In this statement, Ms. Sipiorski took note that Mr. Vue relayed that Mr. Rugama had told him about being approached by Charging Party regarding Mr. Lee's purported monkey comment. (Tr. 340.) Additionally, Mr. Vue stated that he had been told by Susan Vang that Charging Party was not happy with "the whole Jack situation" and that he wanted to get him fired. (Tr. 340; Resp. Ex. 29.)

On or about May 12, 2018, Ms. Sipiorski reviewed a statement written by John Janke, Respondent's Operator on Line 5, which was provided to her by Mr. Scullion. (Tr. 340-341; Resp. Ex. 30.) This statement recalled that Mr. Rugama discussed with Mr. Janke that he (Mr. Rugama) was upset with a conversation he had with Charging Party regarding a monkey comment Charging Party attributed to Mr. Lee. (Tr. 341; Resp. Ex. 30.)

6. Respondent Terminates Charging Party Due to His Dishonesty During and Refusal to Cooperate With Its Investigation.

On or about May 15, 2018, Ms. Sipiorski and Mr. Radmer called Charging Party to provide him with an update on Respondent's investigation and to ask him to return to Respondent's facility. (Tr. 143, 347; Resp. Ex. 36.) Charging Party agreed to return to Respondent's facility the following day to answer Respondent's follow-up questions. (Tr. 348-349; Resp. Exs. 36 and 37.) Ms. Sipiorski and Mr. Preisler met with Charging Party the following day. (Tr. 350,502-503.) They wanted to meet with Charging Party because Respondent had been unable to validate the concerns that he raised regarding Mr. Lee's purportedly racist comment and wanted to determine if there were any more witnesses who Charging Party believed could provide information related to his allegations. (Tr. 350, 502-503.)

Due, in part, to the information Ms. Sipiorski received that Charging Party pursued his claim about the alleged monkey comment because the investigation into the February 2018 petition did not result in the outcome he wanted – Mr. Lee's termination – Ms. Sipiorski and Mr. Preisler also asked Charging Party questions to determine his motive in now reporting the monkey comment he attributed to Mr. Lee with a racial animus. (Tr. 350-352, 502-503.) Ms. Sipiorski correctly pointed out to Charging Party that the February 2018 petition did not contain any reference to the monkey comment. (Tr. 144.) Charging Party referred only to his May 10 meeting with Mr. Schwartz and Mr. Scullion to describe when he previously reported Mr. Lee's purported racially discriminatory monkey comment. (Tr. 99.) When Ms. Sipiorski asked Charging Party whether there were any other witnesses to the alleged monkey comment besides Mr. Thao and Mr. Rugama, he stated, "I'm not going to tell you." (Tr. 146:19-21, 148:6-9. *See also* Tr. 355, 502, 505-506.) In response to questions of his motive, Charging Party stated that he had a right to talk to his brother and Mr. Rugama. He did not explain why he told other employees about the monkey

comment he attributed to Mr. Lee. (Tr. 352.) Charging Party also refused to provide a copy of documentation he claimed to possess that purportedly demonstrated he raised his allegation concerning the monkey comment previously but Respondent's human resources department failed to investigate it. (Tr. 505.)

Charging Party admitted during the meeting that he had not personally witnessed Mr. Lee make a statement regarding monkeys, and instead had heard the statement about the alleged comment second-hand from Chong Thao. (Tr. 357.) Further, Charging Party admitted that Chong Thao had not told him to whom Mr. Lee referred when he purportedly used the word "monkeys," and Charging Party did not know to whom Mr. Lee was referring when Mr. Lee purportedly made the statement regarding monkeys. (Tr. 358, 416, 506-507.) Chong Thao's statement was the only witness statement that indicated that Mr. Lee had used the word "monkeys," and Thao's statement did not establish the comment was directed to any specific individual(s). The rest of the purported witnesses to this incident had only heard about this allegation from another employee. (Tr. 361.)

Ms. Sipiorski determined that Charging Party provided Mr. Rugama false information about what Mr. Lee allegedly stated concerning African American employees. (Tr. 362, 416.) Ms. Sipiorski also concluded that, after Charging Party reported to management the allegation that Mr. Lee made a racist comment about other employees, Charging Party then tried to create a witness to support those allegations by going to Mr. Rugama, telling him that Mr. Lee made a racist comment referring to Mr. Rugama, and telling him that management would be asking him about the incident. (Tr. 359.) Charging Party's dishonesty was highly significant to Ms. Sipiorski because Mr. Lee could have lost his job as a result of Charging Party's false allegations. (Tr. 363.)

On May 16, 2018, after Ms. Sipiorski's meeting with Charging Party, she received a statement from Xe Xiong. (Tr. 366; Resp. Exs. 38 and 39.) In this statement, Ms. Xiong described

that Charging Party had asked her to sign his February 2018 petition and further stated, "Tou Vang explained the petition that he wanted a lot of people to sign [it] to get Jack fired so he (Tou) can sign up for Jack's position." (Tr. 434-438; Resp. Ex. 39.) However, Ms. Xiong refused to sign the petition because Mr. Lee did not do anything bad to her and did not yell at her. (Tr. 435.)[10] Ms. Xiong's statement matched the description she previously provided to Respondent when she was interviewed. (Resp. Ex. 38.) Ms. Xiong's statement confirmed Ms. Sipiorski concern that Charging Party did not make his allegations against Mr. Lee in good faith, but rather to achieve his termination for his own personal gain by obtaining Mr. Lee's job. (Tr. 367.)

Ms. Sipiorski then recommended to Ms. Rajchel and Mr. Brenneman that Respondent terminate Charging Party's employment. (Tr. 373.) Ms. Sipiorski discussed her recommendation with Ms. Rajchel along with presenting her non-exhaustive spreadsheet summary of the information she gathered during the course of her investigation. (Tr. 371-372, 412-413; G.C. Ex. 57.)

Subsequently, Ms. Sipiorski and Ms. Rajchel discussed the investigation findings and conclusions with Kelly Liljenquist,[11] Respondent's Field Human Resources Manager, to provide an outside perspective on the investigation and recommendation. (Tr. 373-374.) Ms. Sipiorski, Ms. Rajchel, and Mr. Lindquist ultimately agreed with the recommendation to terminate Charging Party's employment because of his dishonesty and refusal to cooperate during Respondent's investigation. (Tr. 374, 423-424; G.C. Ex. 10.) Specifically with regard to Charging Party's dishonesty, Respondent determined that he falsely alleged Xe Xiong said another team leader was racist, falsely reported that Mr. Lee had called a group of three African American employees

[10] Contrary to the judge's findings, Ms. Xiong denied during her hearing testimony that she ever had a conversation with Charging Party about Ms. Tarkowski. (Tr. 438-439.) (Exception 15.)
[11] The hearing transcript refers to Mr. Liljenquist's surname as "Lindquist."

monkeys, and falsely stated that Mr. Rugama had said he would have signed Charging Party's petition if he had known about the monkey comment. (Tr. 377-388, 423.) With regard to Charging Party's refusal to cooperate, Respondent determined that he expressly refused to answer Ms. Sipiorski's follow-up questions during her meeting with him on May 16, 2018. (Tr. 424.)

On May 21, 2018, Ms. Sipiorski met with Charging Party to inform him of Respondent's investigation findings and the decision to terminate his employment. (Tr. 375; Resp. Ex. 44; G.C. Ex. 10.) At this meeting, Ms. Sipiorski reviewed with Charging Party its Corrective Action Form documenting the decision and provided him with a copy of it. (Tr. 375; G.C. Ex. 10.) The Corrective Action Form identified the reason for Charging Party's discipline as "Dishonesty and refusal to cooperat[e] during an investigation." (G.C. Ex. 10.) The disciplinary documentation also described Charging Party's behavior observed by Respondent as "Tou Yia Vang was found to be dishonest when he presented false information and refused to cooperate in the investigation to substantiate his claims." (*Id.*)

During the termination meeting, Ms. Sipiorski also reviewed Respondent's internal process by which he could appeal the decision to terminate his employment. (Tr. 379-380.) Ms. Sipiorski provided Charging Party with Mr. Liljenquist's telephone number in the event he wanted to speak with someone external to Respondent's facility who was not directly connected to the investigation that led to the decision to terminate his employment. (Tr. 380-381.)

7. Respondent Consistently Terminates Employees Who Violate Its Policy Prohibiting Dishonesty.

Respondent consistently enforces its policy prohibiting dishonesty against all employees. In response to a conclusion that an employee engaged in dishonesty, Respondent typically terminates the employment of the offending employee. (Tr. 417.) Examples of Respondent's consistent practice include:

- On or about January 10, 2017, Respondent terminated the employment of Jeffrey Wickesberg because he falsified information on documentation. (Resp. Ex. 5, at 10.) Specifically, Mr. Wickesberg entered on a form the time a check of metal/weights was required to be taken and not the actual time the check was completed. (*Id*.)

- On or about March 27, 2017, Respondent terminated the employment of Renee Junius because she provided false statements during an investigation. (Tr. 248-249; Resp. Ex. 5, at 2.) Specifically, Ms. Junius falsely claimed that a female employee was afraid to leave Respondent's facility alone for fear of a male employee's actions and asked her co-workers to escort her to her car. (*Id*.)

- On or about June 13, 2017, Respondent terminated the employment of Samuel Buth because he requested to switch days of work under false pretenses. (Tr. 249-250; Resp. Ex. 45.) Specifically, Mr. Buth asked a Team Leader to switch his days scheduled with other employees so he could attend a wedding, but he later admitted he sought to change his schedule to attend a country music festival. (*Id*.)

- On or about July 20, 2017, Respondent terminated the employment of Nally Chang because he provided false information in response to questions presented during an investigation. (Tr. 250-251; Resp. Ex. 5, at 5.) Specifically, Ms. Chang denied taking a break when video footage confirmed she did, in fact, take a break during the time she denied having done so. (*Id*.)

- On or about November 16, 2017, Respondent terminated the employment of Randy Stussy because of his dishonesty during an investigation. (Tr. 250; Resp. Ex. 46.) Specifically, Respondent learned that Mr. Stussy took extra breaks with a coworker during his shifts for an extended period of time. (*Id*.) Mr. Stussy was dishonest as he took these breaks and failed to report his coworker who also violated Respondent's policy. (*Id*.)

- On or about November 20, 2017, Respondent terminated the employment of Nolan Burns because he took extra breaks during his shift along with another employee and did not report taking these breaks. (Tr. 251; Resp. Ex. 5, at 6.) Specifically, Respondent concluded that Mr. Burns took extra unapproved breaks for an extended period of time with a co-worker and did not report his co-worker for taking extra breaks. (*Id*.)

- On or about February 21, 2018, Respondent terminated the employment of Naam Matthews because he provided false information on his hire documents. (Tr. 251; Resp. Ex. 5, at 7.) Specifically, on his hire documents, Mr. Matthews falsely stated that he did not have military experience or a disability.

- On or about March 23, 2018, Respondent terminated the employment of Alyssa Volkman because of her dishonesty in alleging a job related injury. (Tr. 251-252; Resp. Ex. 5, at 8.) Specifically, Ms. Volkman falsely alleged she injured her foot while at work. (*Id*.)

- On or about July 20, 2018, Respondent terminated the employment of May Moua because she provided false information during an investigation. (Tr. 252; Resp. Ex. 5, at 9.) Specifically, Ms. May provided false information in response to questions during Respondent's investigation into her falling asleep while bridging a moving conveyer belt with her body. (*Id*.)

- On or about August 13, 2018, Respondent terminated the employment of Marco Keyes because he was dishonest during the taking of Respondent's Tabe test. (Tr. 247-248; Resp. Ex. 5, at 1.) Specifically, Mr. Keyes attempted to pass the Tabe test by bring to the test materials that contained the test answers. (*Id*.)

II. QUESTIONS PRESENTED

A. Whether Charging Party engaged in protected concerted activity when he falsely alleged that Mr. Lee called African American employees "monkeys" and then attempted to create witnesses to support his allegation. (Exceptions 2 - 4, 6, 8 - 11, 13, and 20 – 32.)

B. Whether Respondent violated the Act when it discharged Charging Party for dishonesty because he falsely alleged that Mr. Lee called African American employees monkeys and then attempted to create witnesses to support his allegation. (Exceptions 1 - 3, 5, 7, 14 - 19, 32, 40 - 43.)

C. Whether Respondent violated the Act when it instructed Charging Party not to interfere in its investigation by communicating to other employees about his allegation that Mr. Lee called African American employees monkeys. (Exceptions 12, 34, and 38.)

D. Whether Respondent violated the Act when it questioned Charging Party about the reasons he alleged Mr. Lee called African American employees monkeys after it received information and statements from other employees that Charging Party attempted to create witnesses to support his allegation and for the purpose of seeking Mr. Lee's termination so he could obtain that job. **(**Exceptions 35 - 37, and 46.**)**

III. SUMMARY OF ARGUMENT

This case is about whether the Charging Party is protected by the Act when he falsely alleges another employee directed a racial slur at African Americans so that the targeted employee would be wrongfully terminated. The Board should reverse the Administrative Law Judge's ("Judge") rulings, findings, and conclusions that Respondent terminated Charging Party in violation of the Act because he engaged in protected, concerted activity. The Judge ignored Board precedent, made determinations of fact unsupported by evidence, and ignored unrefuted testimony and documents in reaching his decision.

The hearing evidence established that Charging Party wanted one thing at Respondent: Jack Lee's job. After Charging Party's prior efforts to cause Respondent to terminate his co-worker, Jack Lee, proved unsuccessful, Charging Party manufactured a claim that Mr. Lee used a racial slur at work in reference to a group of African American employees. Charging Party pursued this allegation without the support of any co-worker and in his personal interest of obtaining Mr. Lee's position. Respondent came to learn during its investigation into Charging Party's allegation that he sought to plant evidence with African American employees to support his claim, fabricated a separate allegation that another employee supported a racial discrimination complaint against a different individual, and embarked on his course of conduct to take Mr. Lee's job. Based on the clear evidence of dishonesty, which went unrebutted by Charging Party when he refused to respond to Respondent's questions to explain his conduct, Respondent terminated Charging Party's employment.

The Judge ignored evidence and wrongly applied Board precedent to conclude that Charging Party engaged in protected concerted activity. To reach this conclusion in error, the Judge determined that whether Charging Party engaged in his conduct for the purpose of mutual aid or protection was "irrelevant." Further, the Judge wrongly credited Charging Party's testimony

over that of unbiased, third-party witnesses to determine Charging Party did not engage in any misconduct that lost him the protections of the Act.

In evaluating Respondent's decision to terminate Charging Party's employment, the Judge erred in how he applied the *Wright Line* framework. The judge did not consider the compelling evidence that demonstrated Respondent responded to Charging Party's workplace policy violation the same way it had with multiple other employees who engaged in similar misconduct in the recent past. Even under the standard applied by the Judge, he otherwise relied on unsupported assumptions of Respondent's animus instead of the overwhelming evidence that established Respondent acted in good faith and without regard to any unlawful motivation when it terminated Charging Party's employment.

Moreover, the Judge made reversible errors when he evaluated Respondent's communications with Charging Party while investigating his false claims of racial discrimination against another employee. Ultimately, the Judge wrongly determined that Charging Party's interest to falsely allege his co-worker used a racial slur outweighed Respondent's interest to ensure the accused employee received a full and fair investigation untainted by Charging Party's attempts to unduly influence Respondent's conclusions. Ignoring precedent that establishes an employer's legitimate interest to inquire of workplace misconduct, the Judge also wrongly limited Respondent's ability to question Charging Party of his motive.

The Judge's decision is based on errors of law and conclusions of fact that are not supported by the evidence. The Board should not allow an employee's false allegations of racial misconduct for the purpose of obtaining another employee's job to receive the Act's protections.

IV. ARGUMENT

The Judge's decision and legal conclusions are based on factual findings that are directly and unquestionably contradicted by the record evidence in this case. The Board reviews *de novo* the Judge's decision. *See Boddy Const. Co.*, 338 NLRB 1083, 1083 (2003) ("In reviewing the decisions of administrative law judges, the Board considers the entire record, *de novo*, in light of the exceptions and briefs, to determine whether the Judges' rulings, findings, and conclusions are supported by the preponderance of the relevant evidence."); *Standard Dry Wall*, 91 NLRB 544, 545 (1950) ("In all cases, save only where there are no exceptions to the Trial Examiner's proposed report and recommended order, the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence. Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings."), *enfd*. 188 F.2d 362 (3d Cir. 1951). *See also Williamson Mem'l Hosp.*, 284 NLRB 37, 38 (1987) ("Inasmuch as the judge has failed to perceive and resolve . . . the factual and legal issues before him, the Board is certainly free to review the record *de novo* and make appropriate findings of fact and conclusions of law").

Further, the Board may overturn a judge's credibility resolutions when they are not primarily based on demeanor. *See, e.g.*, *Marshall Engineered Products Co.*, LLC, 351 NLRB 767, 768 (2007) ("[W]e emphasize that the judge did not resolve the issue of credibility based primarily on demeanor."); *J.N. Ceazan Co.*, 246 NLRB 637, 638 n.6 (1979) ("[W]e view the [ALJ's] credibility resolutions . . . as unsupported by the record and based more on his analysis of the circumstances than on the demeanor of the witnesses."); *Cleveland Electro Metals Co.*, 221 NLRB 1073, 1074 n.5 (1975) ("[W]here credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.").

A. The Judge Erred in Concluding that Charging Party Engaged in Protected Concerted Activity. (Exceptions 2 - 4, 6, 8 - 11, 13, and 20 – 32.)

The Board should reverse the Judge's conclusion that Charging Party engaged in protected concerted activity prior to his discharge. Charging Party did not seek to promote mutual aid or protection with his conduct. Rather, Charging Party was motivated by his self-serving interest to see Respondent terminate Mr. Lee from employment so Charging Party could take his position. Moreover, Charging Party's fabricated allegation of racially discriminatory conduct by Mr. Lee lost any protections of the Act he might otherwise claim. Through the correct analysis, the Board should dismiss the General Counsel's Complaint because Charging Party did not engage in protected concerted activity.

1. <u>The Judge Improperly Disregarded Charging Party's Motive in Communicating with Employees as Irrelevant. (Exceptions 3, 4, 6, 8, 11, 20 - 26, and 29 - 31.)</u>

In evaluating whether Charging Party engaged in protected, concerted activity, the Judge wrongly determined that, "An employee's subjective reason for engaging in conduct is irrelevant to the question of whether the conduct is concerted." (Exception 31.) This premise undermines black letter law of the Act that activity must be for "mutual aid or protection" to constitute protected concerted activity.

The Judge's reasoning disregards a host of precedent that requires activity to be for the purpose of mutual aid or protection. "Not all activities in which employees act together are 'concerted activities' within the meaning of the [Act]." *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 752 (4th Cir. 1949) (cited with approval by *Indiana Gear Works v. NLRB*, 371 F.2d 273, 276 (7th Cir. 1967)). An individual employee engages in protected, concerted activity if it is undertaken "with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." *Mushroom Transp. Co. v. NLRB*,

330 F.2d 683, 685 (3d Cir. 1964). Ultimately, the purpose of the employee's conduct must be for the mutual aid or protection of employees to be protected. *Joanna Cotton Mills Co.*, 176 F.2d at 753. Collective action born from an employee's personal resentment at a supervising employee does not give rise to employees' statutory rights under the Act. *Id*. at 751-52. *See also Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 212 (4th Cir. 2005) (holding "personal missions are not the sort of concerted activity which the statute protects.")

For example, an employer lawfully discharged an employee who convinced his co-workers to sign a petition for the removal of a foreman where the employee's motives "grew out of personal resentment at discipline imposed by that foreman." *Joanna Cotton Mills Co.*, 176 F.2d at 751-52. Additionally, an employer lawfully terminated the employment of an employee that arose from his confrontation of a foreman for the foreman's alleged sexual harassment of another employee because the employee "was neither attempting to enforce a collective bargaining agreement, seeking to induce group action, nor acting on behalf of a group." *Blaw-Knox Foundry & Mill Machinery Inc. v. NLRB*, 646 F.2d 113, 116 (4th Cir. 1981).

The Judge relied on *Circle K. Corp*., 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993) as the sole authority to support his reasoning that Charging Party's motive was irrelevant to whether he engaged in protected concerted activity. (D. 18-19.)[12] In *Circle K*, the employee at issue, Charlotte Moneagle, solicited another employee, Ron Beard, to sign a letter of support for joining a union. *Id*. Moneagle's letter included multiple direct references to terms and conditions of employment, including wage increases, working conditions, performance evaluations, job security, hours, and write-ups. *Id*. Beard declined to sign Moneagle's letter but said he would "consider it." *Id*. When the company later terminated Moneagle's employment due

[12] References to the ALJ's Decision are identified by page and line numbers, as "D. ___, L. ___," or page and footnote, as "D. ___, n.___."

to this union organizing activity, the Board found that Moneagle's invitations to join in organizing activity did not have to be accepted by Beard for her activity to be protected concerted activity. *Id*.

Here, Charging Party's conduct is incomparable to the protected concerted activity at issue in *Circle K* because the evidence at hearing conclusively established that Charging Party's motives were for purely selfish reasons. That is, Charging Party did not intend to benefit other employees with his repeated attempts to target Mr. Lee with fabricated allegations of racial misconduct. He only wanted Mr. Lee's job. This conclusion is directly established by two sources.

First, Charging Party told other employees that he targeted Mr. Lee to have him terminated from employment. Xe Xiong confirmed that from the outset of Charging Party's February petition, he sought to have Mr. Lee terminated from employment so he could take Mr. Lee's position. (Tr. 434-435.) Ms. Xiong advised Respondent of this fact and reduced her knowledge to writing in the statement she provided Ms. Sipiorski on May 16, 2018. (Tr. 436-438, Resp. Ex. 38 and 39.) Additionally, Chong Vue similarly reported to Respondent that, after Respondent resolved the February petition and disciplined Mr. Lee for his treatment of other employees, Charging Party was not happy with "the whole Jack situation" and that he wanted to see to Mr. Lee discharged. (Tr. 340; Resp. Ex. 29.)

Second, Charging Party presented a shifting allegation and attributed a racial animus to his claim of Mr. Lee's monkey comment only after Respondent did not terminate Mr. Lee in response to the February petition. In Charging Party's February statement received by Respondent following the February petition, Charging Party wrote, "[W]as eating lunch one night, heard [C]hong [T]hao mention that Jack [Lee] said he put three monkeys on bins and they can't even do it." (G.C. Ex. 4.) This statement did not include any description that Mr. Lee's reference to "monkeys" was racially motivated and directed to African American employees. (*Id*.) After Respondent advised

Charging Party on February 21 that Mr. Lee would return from an unpaid suspension with, an additional, disciplinary warning, Charging Party then escalated the allegation to include a racially discriminatory component. (Tr. 477.) This change in behavior together with the statements of other employees, all pushed aside by the Judge, strongly demonstrates that Charging Party's sole motive was to see to Mr. Lee's discharge so he could take his job.[13]

In addition to the evidence establishing that Charging Party acted for purely selfish reasons, the Judge failed to address Charging Party's testimony that refuted he had any identifiable basis to continue to pursue his allegation against Mr. Lee after February 21. Charging Party testified that his purpose in presenting the February 2018 petition was for Mr. Lee to receive coaching and not to see Mr. Lee terminated. (Tr. 106-107.) As described above, after Respondent received the petition and completed its investigation into the allegations against Mr. Lee, Ms. Sipiorski advised Charging Party, and other employees in attendance at the February 21 meeting, that Mr. Lee received corrective action for the substantiated allegations in the form of an unpaid suspension.[14] Moreover, Charging Party acknowledged during his testimony that Ms. Sipiorski advised him and the other employees present at the February 21 meeting that Respondent would coach Mr. Lee. (Tr. 65.) Thus, by February 21, Charging Party had submitted his allegation concerning the monkey comment and learned that Mr. Lee's conduct was addressed by Respondent. Thereafter,

[13] In evaluating whether Charging Party engaged in protected concerted activity, the Judge wrongfully deemed as also "irrelevant" whether Mr. Lee actually made the monkeys comment in reference to black employees. (Exception 31.) The Judge reasoned that Respondent possessed sufficient information to suggest Mr. Lee directed the comment towards black employees based on an e-mail Walter Brzoska sent Ms. Sipiorski on May 16, which described his and Mr. Schwartz's discussion with Chong Thao. (G.C. Ex. 38.) Completely contrary to the Judge's description that this e-mail demonstrated Mr. Thao's statement supported Charging Party's claim that Mr. Lee directed his alleged comment towards black employees, Mr. Brzoska's e-mail recalled, "When we followed up with which area/anyone specific Jack was talking about, Chong did not know specifically what area." Thus, Mr. Thao's statement, described by Mr. Brzoska, did not provide Respondent with detail regarding whom Mr. Lee directed his purported monkey comment. (Exception 33.)

[14] Ms. Sipiorski's testimony that she advised employees at the February 21 meeting that Respondent was returning Mr. Lee from suspension was unrefuted. Charging Party testified he could not recall if Ms. Sipiorski discussed Mr. Lee's suspension at the meeting. (Tr. 108:3-5.)

the General Counsel did not establish any new misconduct that Charging Party observed or experienced by Mr. Lee. (*See* Tr. 302-303.)

Hence, by his own testimony, Charging Party lacked any motive to improve workplace conditions when he renewed the complaint in May because Respondent had already issued corrective action to Mr. Lee in response to his allegation in February that Mr. Lee called other (unspecified) employees monkeys. The only logical conclusion is that Charging Party did not truthfully testify about his motive and that it was, in fact, to see to Mr. Lee's termination from employment so he could take Mr. Lee's position as he contemporaneously reported to other witnesses.

Moreover, the Judge wrongly cited to *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 681 (2000) to support the proposition that Charging Party could rightfully seek dismissal of Mr. Lee and retain the protections of the Act where "it is evident the supervisor's conduct has an impact on employee's working conditions." (D. 19, n. 42.) While Mr. Lee was indisputably not Charging Party's supervisor, the Judge's reasoning ignores the crucial requirement that it must be evident that the offending employee's conduct has an impact on employee working conditions to be protected concerted activity. Indeed, the United States Court of Appeals, District of Columbia Circuit reversed the *Epilepsy Foundation of Northeast Ohio* Board's conclusion that the employee discharges were unlawful under the Act because the employee memorandum serving as the basis for protected concerted activity "contained no specific objections to any terms and conditions of employment, but, rather, simply rejected [the supervisor's] supervision." *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1103 (D.C. 2001). Here, there is also no such evidence.

The General Counsel failed to establish that any employee supported Charging Party's allegation against Mr. Lee after February 21. Mr. Onyango and Mr. Rugama both rejected

Charging Party's attempts to generate an interest in his fabricated allegation against Mr. Lee. (Tr. 184-185, 188-189, 333-334; G.C. Ex. 13; Resp. Ex. 25.) The General Counsel did not present any evidence of any other employee complaints against Mr. Lee raised after February 21. No other employee expressed a concern with Mr. Lee's behavior after Respondent counseled him in response to the February petition. Thus, Charging Party's continuing allegations against Mr. Lee, following Respondent's prompt remedial action, were not supported by any other employee's desire to improve working conditions on account of Mr. Lee's behavior.

The evidence established at the hearing definitively demonstrates that Charging Party acted solely for the purpose of promoting his own interest to obtain Mr. Lee's position at Respondent when he continued to pursue fabricated allegations of racial misconduct against Mr. Lee. Charging Party's self-serving statements cannot and do not constitute a basis to disregard the credible hearing evidence. By acting purely for selfish reasons, which were not supported by any other employee's desire to improve working conditions related to Mr. Lee, Charging Party failed to take any action for the mutual aid or protection of his co-workers. Thus, his conduct was not protected concerted activity, making Respondent's response to it lawful under the Act.

2. Charging Party's Misconduct Lost Any Protection of the Act. (Exceptions 2, 4, 9, 10, 13, 22, 24, 27 - 30, and 32.)

Even if the Board determined that any portion of Charging Party's activities started off as protected concerted activity, the evidence at hearing clearly demonstrated that Charging Party lost the protection of the Act through his subsequent misconduct. While the Judge acknowledged that a totality of the circumstances approach applies to determine whether an employee's communication between employees loses the protection of the Act, he failed to apply that standard. (D. 19, n.43.) Instead, the Judge interpreted pieces of evidence and testimony in a vacuum to find that Charging Party's conduct retained the protections of the Act. When properly applied, it is clear

that the evidence at hearing establishes that Charging Party lost the protection of the Act by fabricating an allegation of racial misconduct against another employee for the purpose of obtaining that employee's position.

To conclude that Charging Party's actions did not lose the protections of the Act, the Judge relied entirely on Charging Party's conversations with Mr. Rugama as creating a good-faith basis to believe that Mr. Lee referred to African Americans as monkeys. However, the Judge wrongly credited Charging Party's testimony that Mr. Rugama told Charging Party that Mr. Lee referred to black employees who worked on bins when he allegedly made the monkey comment. (Exception 9.) Mr. Rugama testified that Charging Party told him, "I heard that Jack called you a monkey in the break room." (Tr. 187:17-19.) The Judge's rationalization to credit Charging Party's contradictory testimony of the conversation is fatally flawed for two reasons.

First, the Judge's reasoning to credit Charging Party over Mr. Rugama is wholly inconsistent. The Judge faulted Mr. Rugama for not including on his written statement he submitted to Respondent at the time of the events that Charging Party told him Mr. Lee called him a monkey in the break room. (D. 8, n. 20.) In essence, the Judge expected Mr. Rugama's summary statement to present a word-for-word transcript of the conversation notwithstanding that Mr. Rugama testified to the details of the discussion. Still, Mr. Rugama's statement makes no reference to deducing that Mr. Lee referred to Mr. Rugama and other black employees with the monkey comment as Charging Party represented at the hearing. (GC Ex. 13.) Indeed, in Charging Party's own May 16, 2018 written statement, Charging Party also did not indicate that Mr. Rugama – and not Charging Party – surmised that Mr. Lee's alleged "monkey" comment referred to black employees. (GC Ex. 9.) If the Judge discredited Mr. Rugama's hearing testimony because of the

description absent from his written statement, then he likewise should discredit Charging Party's hearing testimony because his own written statement included identical omissions.

Second, the Judge criticized Mr. Rugama's testimony for reasons attributable to the fact that English is his second language. Specifically, the Judge reasoned that Mr. Rugama "appeared uncertain in a manner that Vang did not when he testified about the same subject matter." (D. 8, n. 20.) The Judge did not further elaborate on what he meant by this criticism of Mr. Rugama's testimony. This vague critique of Mr. Rugama's testimony fails to account for the fact that he was forthcoming during his testimony that his hesitation in providing information was due to the fact that English is a second language to him and he has been in the United States for only three years. (Tr. 189.) Thus, the Judge committed fatal error by dismissing Mr. Rugama's testimony without permissible reason.

Mr. Rugama presented the only credible testimony of his conversations with Charging Party. This conclusion is supported by the fact that Mr. Rugama was a disinterested witness without any identifiable incentive to avoid truthful testimony. Additionally, his testimony was consistent with another comparable witness – Xe Xiong.

Mr. Rugama and Ms. Xiong's testimony demonstrate a consistent pattern that establishes Charging Party had a habit of falsely claiming other employees supported statements of racial animosity. Both Mr. Rugama and Ms. Xiong consistently testified that Charging Party wrongly represented that each ascribed a racially discriminatory animus to statements concerning other individuals. For Ms. Xiong, Charging Party falsely claimed that she stated Ms. Tarkowski was racist. (Tr. 87-88.) For Mr. Rugama, Charging Party falsely claimed that he (Mr. Rugama) stated Mr. Lee referred to African American employees as monkeys. (Tr. 187-188.) The Judge's failure

to recognize and address Charging Party's pattern of conduct in this regard constitutes reversible error.

A review of the totality of the circumstances established at hearing conclusively demonstrates that Charging Party's allegations of racially discriminatory comments by Mr. Lee was misconduct that lost the protection of the Act. After Charging Party re-raised his allegation that Mr. Lee called employees monkeys and doubled down by adding a racially discriminatory animus by claiming he directed that moniker towards Black employees, he began to plant information to illicitly support it. After meeting with Mr. Preisler and Mr. Balakrishan on May 9, 2018, Charging Party reminded Mr. Rugama of his (Charging Party's) past allegation that Mr. Lee called Mr. Rugama a monkey. (Tr. 187-188.) At the time Charging Party attempted to influence Mr. Rugama, he (Charging Party) had full knowledge that he had not heard Mr. Lee make this comment, he did not know to whom Mr. Lee directed this comment, and he did not know that it was directed at black employees. (Tr. 357-358, 416, 506-507.) Charging Party admitted to his lack of knowledge on May 16, 2018, during his meeting with Ms. Sipiorski. (Tr. 351, 502-503.) At the same time, during his follow-up interview with Ms. Sipiorski, Charging Party refused to answer her questions of other witnesses who may have heard Mr. Lee make this comment. (Tr. 355, 505-506.)

The Board also should not ignore, like the Judge did, that Charging Party's fabricated allegations of racial misconduct had potentially severe consequences and made them of a nature to lose the protections of the Act. They placed Mr. Lee's job in jeopardy. (Tr. 363.) This was especially apparent to Charging Party when he was previously advised that Mr. Lee was placed on an unpaid suspension and received a disciplinary warning as a result of the allegations leveled against him by employees prior to February 21. (Tr. 295, 381.)

Moreover, Respondent received information from other employees that Charging Party acted maliciously by raising his false allegations and for the purpose of obtaining Mr. Lee's Line Coordinator job. *Supra* Section I.B.2. These facts strongly support not only that Respondent held an honest belief that Charging Party engaged in misconduct simultaneous with any purported protected activity, but also that Charging Party's misconduct was so malicious and egregious that it lost any protection under the Act.

B. The Judge Erred in Concluding that Respondent Violated § 8(a)(1) When It Terminated Charging Party's Employment Because of His Dishonesty During Its Investigation into His Allegations. (Exceptions 1 - 3, 5, 7, 14 - 19, 32, 40 - 43.)

The Judge applied both the frameworks of *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982) and *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964) to analyze and evaluate Respondent's decision to terminate Charging Party's employment. However, he wrongfully ignored the evidence establishing that Respondent rightfully and plausibly concluded that Charging Party engaged in conduct from which it could reasonably and rationally conclude he attempted to fabricate evidence of racial discrimination by Mr. Lee for the purpose of causing Respondent to terminate Mr. Lee's employment to make that position available to Charging Party.

1. The Evidence Demonstrates that Respondent Acted on a Good-Faith Belief that Charging Party Fabricated an Allegation of Racial Discrimination and Sought to Create Evidence to Support It. (Exceptions 3, 5, 14, 19, 32, 40, 42, and 43.)

In any case alleging violation of § 8(a)(1) and "turning on employer motivation," the *Wright Line* burden shifting analysis applies. 251 NLRB 1083, 1089 (1980), enf'd 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel bears an initial burden to prove a *prima facie* case that a substantial or motivating factor in the employer's decision to take adverse action was an employee's protected, concerted activity. *Id*. To carry this burden, the General Counsel must prove: (1) the employee engaged in concerted

activities; (2) the concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity. *Id*. Once the General Counsel meets this burden, it shifts to the employer to show by a preponderance of the evidence that it would have taken the same action even absent the prohibited motivation. *Id*.

The Judge's partial application of the *Wright Line* framework constituted reversible error. (Exception 40.) The Judge concluded that the *Wright Line* framework applied because Respondent's decision to terminate Charging Party was based on events other than protected concerted activity. (D. 26, L. 23-26.) Yet, the Judge isolated aspects of Respondent's rationale for discharging Charging Party to evaluate each in a vacuum outside of *Wright Line*. (D. 24, L. 35 – D. 26, L. 10.)

When *Wright Line* is correctly applied to the evidence developed at hearing, it is clear that the Judge erred in concluding the General Counsel established a *prima facie* case as required by *Wright Line* through circumstantial evidence. (D. 27, L. 7-35.) The Judge concluded that the General Counsel presented a *prima facie* case exclusively through circumstantial evidence based on *Lucky Cab Co*., 360 NLRB 271, 274 (2014). However, the General Counsel lacked indirect evidence of "contrived defenses, timing, departure from past practice, brusque terminations of six long-term employees without permitting explanation or justification, [and] the unusually high number of discharges in a relatively short period before the election" relied upon to support a finding of discriminatory motive in *Lucky Cab Co*. *Id*. at 289-290. In contrast to the employees at issue in *Lucky Cab Co*., Charging Party's termination was consistent with Respondent's past practice of terminating employees for providing false information during an investigation, Charging Party experienced no negative consequences after engaging in purported protected

activity over a period of multiple months, Charging Party submitted a written explanation of his behavior prior to the termination decision by Respondent, and no other employee engaged in Charging Party's petition or communications experienced any adverse actions.

Indeed, the Judge's descriptions of the circumstantial evidence he relied on to conclude the General Counsel presented a *prima facie* case are unsupported by the evidence. For example, the Judge found that Respondent had a "shifting explanation" for its decision to terminate Complainant's employment because Charging Party's failure to cooperate in Ms. Sipiorski's investigation was not contained in a spreadsheet she maintained "*summarizing* the results of the investigation." (Exception 45)(emphasis added). Contrary to the Judge's description, Ms. Sipiorski's spreadsheet noted that Charging Party did not respond to her questions during the May 16 meeting. (G.C. Ex. 57, at p. 6, column C, row 21.)(Exception 19.)

However, this description is also refuted by the fact that Charging Party's interview, in which he refused to respond to Respondent's questions, occurred shortly before Ms. Sipiorski's meeting with Ms. Rajchel. (Tr. 373.) During this meeting, Ms. Sipiorski advised Ms. Rajchel that she concluded Charging Party did not rebut the evidence of false statements received by Respondent because he refused to answer her questions. (*Id*.) This testimony was unrefuted. Thus, there is no basis to conclude there was ever any shifting explanation to explain Respondent's decision to terminate Charging Party's employment.

In other respects, the Judge's description of circumstantial evidence is nowhere supported in the record by any evidence. The Judge concluded that at the February 21 meeting, Ms. Sipiorski "chastised and demeaned the employees." (Exception 42, 43.) However, no witness testified to support a finding Ms. Sipiorski made any statements to this effect. Ashley Schmitt was unable to recall much of what occurred during this meeting. (Tr. 173-176, 179.) Charging Party

acknowledged employees were advised that as a result of the petition, Respondent would coach Mr. Lee to improve his performance (Tr. 65, 108.) This testimony does not support the description that Ms. Sipiorski acted inappropriately with employees who attended the February 21 meeting.

The Judge's purported circumstantial evidence also identified an internal e-mail sent by Ms. Rajchel in which she wrote, "If [Charging Party] gives you any issues, please let me know. He can be (trying to be PC) complex." (Exception 44.) The Judge's conclusion that any circumstantial inference can be attributed to this e-mail is impossible and pure speculation. Ms. Rajchel sent her e-mail over one month prior to when Respondent terminated Charging Party's employment. (G.C. Ex. 56.) Ms. Rajchel did not testify to attribute any meaning to her words. Ms. Rajchel also was not directly involved in receiving or responding to any conduct that the General Counsel claims to be protected concerted activity. Moreover, the subject of the e-mail was a potential referral bonus Charging Party claimed for a referral made to another location of Respondent. (*Id*.) Ms. Rajchel's e-mail was unequivocally irrelevant to Charging Party's alleged protected conduct or the decision to terminate his employment.

The General Counsel simply never met its burden to establish a *prima facie* case that Charging Party's protected concerted activity motivated Respondent's decision to terminate his employment. Thus, the Judge should have ended his analysis there. However, the Judge compounded his error by holding Respondent to an unduly high burden of proof when evaluating Respondent's *Wright Line* defense rather than the preponderance of the evidence standard. *Merillat Industries, Inc.*, 307 NLRB 1301, 1303 (1992). In this regard, the Judge's decision conflicted with Board precedent because he failed to recognize and follow that "Respondent's defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it." *Id*.

The hearing evidence demonstrated that Respondent consistently terminated employees for dishonesty and providing false information in the course of their employment. (Tr. 248-252; Resp. Ex. 5.) In 2017 and 2018 alone, Respondent terminated ten employees, each of whom, like Charging Party, violated Respondent's policy that prohibited dishonesty. (*Id.*) These terminations show that, regardless of any alleged protected concerted activity in which Charging Party may have engaged, Respondent would have terminated him for his misconduct that was not protected by the Act. Further, these examples of past conduct demonstrate that Respondent has not tolerated such actions and strongly supports it was not motivated by any concerted activity in which Charging Party engaged.

Moreover, Charging Party's past experience utilizing Respondent's complaint procedure demonstrates that he was not terminated for asserting a complaint of racial harassment on May 9, 2018. When Charging Party led the employees who presented the February 2018 petition, he did not experience any discipline or other adverse action. (Tr. 298-299.) To the contrary, Ms. Sipiorski met with him and other employees who signed the February 2018 petition to advise them that Respondent reviewed their complaints, found their concerns to be valid, and took action to respond. (Tr. 295.) She also encouraged employees to report any issues they were to experience in the future. (Tr. 295-296.) Similarly, Respondent had ample opportunity to act adversely against Charging Party if it was motivated by his complaints alone. Respondent thereafter received additional complaints from Charging Party on March 1, 2018, and May 9, 2018. (Tr. 157-158, 457-458, 475-476.) Each time, it received Charging Party's information and promised to act on it rather than immediately responding with any disciplinary action against him. Far from demonstrating any animus against protected concerted activity, this evidence conclusively established that Respondent lawfully terminated Charging Party for his unprotected misconduct.

Additionally, Respondent's similar treatment of other employees for analogous offenses eliminates any suggestion that its decision to terminate Charging Party's employment for his dishonesty was a pretext for discrimination. Respondent presented uncontested evidence of ten other employees that it terminated in 2017 and 2018 due to violations of its policy prohibiting dishonesty. (Resp. Ex. 5.) Respondent's consistent past practice to discharge employees who engage in dishonesty demonstrates Respondent took this offense seriously and further supports it acted in good-faith at all times with respect to its decision to discharge Charging Party's employment. The Judge wrongly disregarded this evidence because he concluded in error and without basis in evidence that Charging Party's termination was unrelated to his dishonesty. Respondent's past practice includes:

- On or about January 10, 2017, Respondent terminated the employment of Jeffrey Wickesberg because he falsified information on documentation. (Resp. Ex. 5, at 10.) Specifically, Mr. Wickesberg entered on a form the time a check of metal/weights was required to be taken and not the actual time the check was completed. (*Id*.)

- On or about March 27, 2017, Respondent terminated the employment of Renee Junius because she provided false statements during an investigation. (Tr. 248-249; Resp. Ex. 5, at 2.) Specifically, Ms. Junius falsely claimed that a female employee was afraid to leave Respondent's facility alone for fear of a male employee's actions and asked her co-workers to escort her to her car. (*Id*.)

- On or about June 13, 2017, Respondent terminated the employment of Samuel Buth because he requested to switch days of work under false pretenses. (Tr. 249-250; Resp. Ex. 45.) Specifically, Mr. Buth asked a Team Leader to switch his days scheduled with other employees so he could attend a wedding, but he later admitted he sought to change his schedule to attend a country music festival. (*Id*.)

- On or about July 20, 2017, Respondent terminated the employment of Nally Chang because he provided false information in response to questions presented during an investigation. (Tr. 250-251; Resp. Ex. 5, at 5.) Specifically, Ms. Chang denied taking a break when

video footage confirmed she did, in fact, take a break during the time she denied having done so. (*Id*.)

- On or about November 16, 2017, Respondent terminated the employment of Randy Stussy because of his dishonesty during an investigation. (Tr. 250; Resp. Ex. 46.) Specifically, Respondent learned that Mr. Stussy took extra breaks with a coworker during his shifts for an extended period of time. (*Id*.) Mr. Stussy was dishonest as he took these breaks and failed to report his coworker who also violated Respondent's policy. (*Id*.)

- On or about November 20, 2017, Respondent terminated the employment of Nolan Burns because he took extra breaks during his shift along with another employee and did not report taking these breaks. (Tr. 251; Resp. Ex. 5, at 6.) Specifically, Respondent concluded that Mr. Burns took extra unapproved breaks for an extended period of time with a co-worker and did not report his co-worker for taking extra breaks. (*Id*.)

- On or about February 21, 2018, Respondent terminated the employment of Naam Matthews because he provided false information on his hire documents. (Tr. 251; Resp. Ex. 5, at 7.) Specifically, on his hire documents, Mr. Matthews falsely stated that he did not have military experience or a disability.

- On or about March 23, 2018, Respondent terminated the employment of Alyssa Volkman because of her dishonesty in alleging a job related injury. (Tr. 251-252; Resp. Ex. 5, at 8.) Specifically, Ms. Volkman falsely alleged she injured her foot while at work. (*Id*.)

- On or about July 20, 2018, Respondent terminated the employment of May Moua because she provided false information during an investigation. (Tr. 252; Resp. Ex. 5, at 9.) Specifically, Ms. May provided false information in response to questions during Respondent's investigation into her falling asleep while bridging a moving conveyer belt with her body. (*Id*.)

- On or about August 13, 2018, Respondent terminated the employment of Marco Keyes because he was dishonest during the taking of Respondent's Tabe test. (Tr. 247-248; Resp. Ex. 5, at 1.) Specifically, Mr. Keyes attempted to pass the Tabe test by bring to the test materials that contained the test answers. (*Id*.)

Respondent's consistent response to dishonesty, as illustrated by these examples, leaves no question that Respondent acted in good-faith when it responded to the evidence of Charging Party's dishonesty by terminating his employment.

2. The Judge Ignored the Evidence that Established Respondent Had a Good-Faith Basis to Lawfully Discharge Charging Party Based on His Dishonest Conduct. (Exceptions 7 and 41.)

As an alternative framework for analysis, the Judge also applied *Burnup & Sims* to evaluate Respondent's decision to discharge Charging Party. (D. 25, L. 13 – D. 26, L. 10.) Even assuming for the sake of argument that the *Burnup & Sims* is the applicable framework to analyze Charging Party's discharge, the Judge should have concluded that Respondent's decision was lawful. The Judge erred by ignoring substantial evidence that conclusively demonstrated Respondent held a good-faith and honest belief that Charging Party engaged in a campaign to falsify and manufacture evidence to support racial discriminatory remarks by Mr. Lee.

Respondent never took any adverse action against Charging Party in response to his conduct in February, March, or April. (Tr. 105.) Indeed, even when Charging Party raised his complaint against Mr. Lee in May, Respondent did not take any action against Charging Party until it received information from other employees that Charging Party was prejudicially influencing its investigation by planting and leading employees to serve as witnesses when they had no direct knowledge of the conduct Charging Party attributed to Mr. Lee. (*See* Tr. 90, 95.)

Respondent's lack of discriminatory animus is also confirmed by management's response to Charging Party in March. Mr. Brenneman – the highest-ranking management official at the Company's facility – met with Charging Party to discuss his concerns regarding Mr. Lee. (Tr. 157-158, 457-458.) Mr. Brenneman then met with Ms. Sipiorski and Ms. Rajchel to review the February investigation. (Tr. 300-301, 461-462.) After this review, Ms. Sipiorski met with Charging Party. (Tr. 301-302.) During this meeting, Ms. Sipiorski inquired about his interactions with Mr.

Lee since his suspension and encouraged him to present any new concerns to Respondent. (*Id*.) Respondent's repeated attention to and encouragement to Charging Party to utilize its reporting processes strongly demonstrates it did not hold any animus against him for advising Respondent of detrimental work conditions.

The Judge ignored the fact that Respondent was not protecting a member of management when it responded to Charging Party's misconduct in May 2018, which further demonstrated Respondent's lack of discriminatory animus. There is no dispute that Mr. Lee was not a statutory supervisor and was simply Charging Party's co-worker. (D. 16, n. 39.) The Judge wrongly deemed this fact to be "irrelevant." However, the Board should not view this fact as so lacking due consideration. To be clear, this is not a case where an employer pressed its disciplinary tools upon an employee who sought to rise up against management. Rather, Respondent's actions, to protect false and malicious allegations against one of Charging Party's colleagues, demonstrates its motive to create and foster a work environment that provides fair and equal working conditions for all employees.

Moreover, the Judge failed to consider the overwhelming evidence that Respondent treated Charging Party similarly to other employees who engaged in a comparably dishonest misconduct in the workplace. Multiple of these examples included individuals who provided false statements during an investigation (Resp. Ex. 5, at 2, 5, and 9; Resp. Ex. 46.) This past practice strongly supports Respondent's decision was made in good faith and without regard to any alleged protected concerted activity.

3. <u>The Judge Improperly Substituted His Own Judgment for that of Management. (Exceptions 1, 2, 15 - 19.)</u>

It is paramount Board law that a judge "may not substitute its own business judgment for that of the Respondent or act as a 'super-personnel' department." *Pro-Tech Fire Services*, 351

NLRB 52, 58 (2007). "Even shortsighted or bad business judgments are permissible so long as they are not discriminatory." *Id*. The Judge's decision and reasoning violated this binding precedent in at least two respects.

First, the Judge improperly divided the individual sources of information contributing to Respondent's conclusion that Charging Party fabricated an allegation of racial discrimination against another employee to have that employee terminated. (D. 24, L12 – D. 28, L. 28.) By interpreting the evidence in this manner, the Judge isolated and hyper-critiqued each piece of evidence thereby denying Respondent the ability to draw an ultimate conclusion from the multiple pieces of contributing evidence. This widespread isolating of evidence and insistence to examine all supporting facts in a vacuum denied Respondent any ability to review the totality of Charging Party's conduct and reasonably conclude he engaged in dishonesty. To the contrary of the Judge's conclusion, Respondent determined that it was <u>not</u> mere coincidence that:

- On February 7, Charging Party submitted a petition to Respondent addressing Mr. Lee's conduct. (G.C. Ex. 2.);
- On March 1, 2018, Charging Party met with Factory Manager Brenneman to express his opinions concerning Mr. Lee. (Tr. 155.);
- On March 7, 2018, Ms. Sipiorski questioned Charging Party about his experience with Mr. Lee, and Charging Party did not describe any issues to her. (Tr. 159.);
- On May 9, 2018, Charging Party told Mr. Preisler and Mr. Balarishan that Mr. Lee called black employees monkeys and that Ms. Xiong encouraged him to prepare a petition against Ms. Tarkowski because she is racist. (Tr. 88, 477.)
- On May 10, 2018, Ms. Sipiorski received a statement by an employee that Charging Party was "looking for any reason" to report Mr. Lee to Respondent. (Tr. 308-309, Resp. Ex. 19.);
- Also on May 10, 2018, Mr. Rugama told Mr. Preisler and Mr. Scullion that Charging Party told him (Mr. Rugama) that Mr. Lee called him and two other employees monkeys. (Tr. 187-188.);

- Also on May 10, 2018, Charging Party evasively denied having spoke to Mr. Rugama at all when he, as he later admitted, did in fact speak to Mr. Rugama (Tr. 92.)

- On May 11, 2018, Ms. Xiong denied telling Charging Party that Ms. Tarkowski is racist. (Tr. 495.)

- On May 16, 2018, Charging Party admitted to Respondent that Mr. Thao did not tell him to whom Mr. Lee's purported monkey comment was directed, admitted Mr. Thao did not tell him the comment was directed towards African American employees, refused to answer Ms. Sipiorski's questions concerning the identity of other witnesses. (Tr. 146:19-21, 148:6-9, 355, 358, 416, 502, 505-507); and

- Also on May 16, 2018, Respondent received Ms. Xiong's statement that explained Charging Party pressured her to sign the February 2018 petition so Respondent would terminate Mr. Lee's employment and Charging Party could take that position. (Tr. 436-438; Resp. Ex. 39.)

Taken in total, it is impossible to ignore that Respondent drew a reasoned and good-faith conclusion from the totality of information it received that Charging Party fabricated an allegation of racial animus against Jack Lee to cause Respondent to terminate his employment after his initial effort to achieve this result proved ineffective. Proving all the more convincing was the fact that Charging Party's co-workers were the third-party neutral sources for this mountain of evidence.

Second, the Judge improperly isolated the fact that Charging Party refused to answer any questions related to Respondent's evidence once it became aware of his true motivation to raise the allegation or racist conduct against Mr. Lee. Charging Party's refusal to answer any questions left Respondent with unrebutted evidence against Charging Party. His silence was not a "sole infraction" (D. 28, L. 20-22) to be judged independently and in a vacuum – it contributed to the

lawful basis for Respondent's decision to end his employment.[15] By refusing to recognize the totality of evidence that stood against Charging Party, the Judge committed reversible error.

C. The Judge Erred in Concluding that Respondent Violated the Act by Taking Steps to Protect the Integrity of Its Investigation When Charging Party Attempted to Unduly Influence the Investigation's Results. (Exceptions 12, 34, and 38.)

Based solely on Charging Party's self-serving, uncorroborated description of an instruction he purportedly received from Mr. Scullion following his suspension, the Judge concluded that Mr. Scullion's comments to Charging Party independently violated § 8(a)(1). Specifically, Charging Party testified that Mr. Scullion told him, "We don't want you to talk to anybody." (Tr. 95.) No other witness corroborated Mr. Scullion's alleged directive to Charging Party.[16]

Recently, the Board recognized and held that "investigative confidentiality rules are lawful" subject to the tests for facially neutral workplace rules established in *Boeing Co.*, 365 NLRB No. 154 (2017). *Apogee Retail LLC*, 368 NLRB No. 144, Slip Op. at 1 (Dec. 16, 2019). Where the terms of investigative confidentiality rules make them apply for the duration of an investigation, they are lawful. *Id*. Where a rule is not limited in duration, the General Counsel bears the burden to prove that the rule would potentially interfere with the exercise of Section 7 rights. *Id*. at 10. If the General Counsel fails to meet this burden, then the analysis stops there. *Id*. However, even if the General Counsel meets this burden, the Board balances any potential interference with the employer's legitimate justifications associated with the rule. In *Apogee Retail LLC*, the Board applied this balance and found the employer's rules requiring confidentiality regarding investigations into illegal or unethical behavior were lawful. *Id*. In evaluating the

[15] The judge also erred when he relied on Mr. Rugama and Ms. Xiong as comparators to Charging Party because they also "refused the Respondent's requests to provide written statements during the May investigation." (Exception 47.)
[16] The quality of Charging Party's testimony holds so little weight that it should not form the basis of an independent violation of the Act. *See Midland Hilton & Towers*, 324 NLRB 1141 n.1 (1997), citing *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979), *W. D. Manor Mechanical Contractors, Inc.*, 357 NLRB No. 128, slip op. at 2 (2011) (uncorroborated hearsay is entitled to "little weight").

lawfulness of a confidentiality instruction related to an employer's investigation, the Board considers evidence related to the directive to clarify the limitations and impact of the employer's communication. *Securitas Security Servs. USA*, 369 NLRB No. 57, Slip Op. 1-2 (April 14, 2020).

At the outset of his analysis, the Judge failed to evaluate whether the General Counsel met its burden to prove that the instruction interfered with the exercise of Section 7 rights. (D. 21.) Unlike *Apogee Retail LLC*, the General Counsel in this matter had the ability to question Charging Party to establish whether Respondent's instruction interfered with his exercise of Section 7 rights. However, the General Counsel failed to develop any such testimony and, thus, failed to meet its evidentiary burden. (*See* Tr. 95-96.)

Notwithstanding the General Counsel's lack of evidence, the Judge correctly recognized that Respondent had "one of the most compelling business interests to justify" a confidentiality directive to Charging Party because Respondent sought to protect the integrity of its investigation into Charging Party's allegation of racial discrimination against Mr. Lee. (D. 21, L. 14-17.)

The Judge then wrongly applied the Board's *Boeing Company*, 365 NLRB No. 154 (2017) standard and concluded that the balance between Respondent's "most compelling business interest" and the impact on Charging Party's rights under the Act favored Charging Party. The Judge failed to strike the correct balance by ignoring evidence that slammed the scales in Respondent's favor even more than the typically strong interest to preserve the integrity of an investigation.

The *Boeing Company* balance was improperly applied because the Judge failed to consider the fact that Respondent received statements and information demonstrating that Charging Party maliciously intended to generate evidence to support his false allegation and cause Mr. Lee's termination from employment. (Tr. 340, 436-438; Resp. Ex. 29, 39.) Indeed, Mr. Scullion's

instruction was not the first time that Respondent sought to preserve the integrity of its election by preventing Charging Party's interference. On May 9, after receiving Charging Party's allegation against Mr. Lee, Mr. Preissler requested that Charging Party not interfere with its investigation. (Tr. 480.) Charging Party promptly ignored this instruction and sought to create a witness for his allegation in Mr. Rugama. (Tr. 187-188.)

Moreover, any concern for Section 7 rights that Charging Party might have held was severely mitigated by the context in which Mr. Scullion delivered his instruction. Based on Charging Party's testimony, Mr. Scullion delivered his instruction immediately after Respondent confronted Charging Party with its knowledge that he spoke to Mr. Rugama about Mr. Lee's alleged racist comment and that his behavior impeded Respondent's ability to conduct a fair, comprehensive investigation. (Tr. 91-92, 488-489.) This close timing and the subject matter of the conversation made it clear to Charging Party that Mr. Scullion was concerned about and seeking to limit Charging Party's unduly prejudicial influence on other employees that jeopardized Mr. Lee's employment.

When properly applied to Mr. Scullion's instruction to Charging Party, the *Boeing Company* balance favors Respondent. As the Judge specifically found, Respondent held an unquestionably strong interest in preserving the integrity of its investigation into the serious matter of alleged racial misconduct. This interest grew even stronger with Charging Party's actual interference in Respondent's investigation. Mr. Scullion's message to Charging Party came only after Charging Party refused to adhere to a less severe directive and directly interfered in Respondent's investigation – the very concern it sought to protect. Under these circumstances, Respondent's interest increased and Mr. Scullion's directive was lawful.

D. The Judge Improperly Concluded that Ms. Sipiorski Unlawfully Interrogated Charging Party When She Questioned Him About the Information Demonstrating He Sought to Create Witnesses for His Fabricated Allegation of Racial Discrimination. (Exceptions 35 - 37, and 46.)

The Judge wrongly found that Respondent violated the Act by questioning Charging Party about his attempts to fabricate witnesses to support his false allegation of racial discrimination against Mr. Lee. An employer has the right to investigate misconduct in the workplace. *New Jersey Bell Tel. Co.*, 308 NLRB 274, 279 (1992); *Manville Forest Products*, 269 NLRB 390 (1984); *Woodview Rehab. Ctr.*, 265 NLRB 838 (1982); *Service Technology Corp.*, 196 NLRB 845 (1972). An employer may lawfully question an employee about facially valid claims of harassment and threats, even if such conduct took place while the employee exercised his Section 7 rights. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528-529 (2007). An employer is also entitled to interview employees about unprotected activity. *Ogihara America Corp.*, 347 NLRB 110, 114 (2006) (citing *HCA/Portsmouth Regional Hosp.*, 316 NLRB 919, 931 (1995)).

Further still, "an employer may, without violating Sec. 8(a)(1), seek to compel employees to submit to questioning concerning employee misconduct when the employer's inquiry is still in the investigative stage and no final disciplinary action has been taken." *Manville Forest Products*, 269 NLRB at 391, n.5 (citing *Cook Paint & Varnish Co.*, 246 NLRB 646 (1979), enf. denied 648 F.2d 712 (D.C. Cir. 1981)). The Board determines whether management's questioning of an employee is lawful "by considering whether, under all the circumstances, the question reasonably tended to restrain coerce, or interfere with [Section 7 rights]." *Copper River of Boiling Springs*, LLC, 360 NLRB 459, 466 (2014)(emphasis in original)(citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004); *Mediplex of Danbury*, 314 NLRB 470, 472 (1994)).

The Judge also failed to recognize Respondent's obligation to promptly investigate and address claims of racially discriminatory statements, including the origin of such allegations,

consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. All questions directed to employees, including Charging Party, related to this legitimate subject matter of investigation – namely, an allegation of racial discrimination. Respondent's questioning also took place before it administered or made any final determinations about any discipline. Respondent simply did not violate the Act by questioning employees about facts and circumstances that related to Charging Party's false allegation against Mr. Lee. (Tr. 350, 502-503.) Moreover, the fact that Respondent lawfully investigated Charging Party's statements attributing racially discriminatory statements to Mr. Lee without violating the NLRA is supported by the fact that its questioning was "reasonably tailored" by focusing on his statements and knowledge. (Tr. 350-359.) The questions posed to Charging Party included his purpose for speaking with Mr. Rugama (Tr. 351), any witnesses or additional information Charging Party wanted to provide related to his allegation against Mr. Lee (Tr. 352), who Charging Party spoke to about the monkey comment (Tr. 356), and whether Charging Party witnessed Mr. Lee's comment (Tr. 358). The questioning was essential to determine whether Charging Party fabricated an allegation that another employee engaged in racial discrimination. *See Fresenius USA Manufacturing, Inc.*, 362 NLRB 1065, 1066 (2015).

Of course, it should not be lost that it was Charging Party's own reports and demands that caused Respondent to engage in such an investigation, and which prompted the Respondent to question these witnesses. Charging Party stated that he was dissatisfied with Respondent's February 2018 investigation, and that he went to Factory Manager Brenneman to urge additional investigation. (Tr. 157-158, 457-458.) When that did not obtain Charging Party's desired response, he raised the allegation again with other members of management on May 9, 2018. (Tr. 475-476; G.C. Exs. 43-44.) Charging Party repeatedly solicited and urged Respondent to ask more questions of more witnesses, and provided the names of those witnesses. Respondent interviewed Charging

Party because he came and initiated the discussions with management – repeatedly. Respondent interviewed Masomo Rugama and Xe Xiong after Charging Party told Respondent these witnesses had information and after Charging Party urged Respondent to interview them. (Tr. 475, 477.) The evidence simply debunks any allegation that Respondent initiated and pursued this investigation for any reason other than because Charging Party repeatedly urged it to do so. Charging Party's recurrent calls for additional investigation strongly weigh against any conclusion that Respondent subsequently violated the Act when it responded to those requests for investigation.

V. CONCLUSION

The Judge's decision allows an employee to use the Act as a shield to prevent any employer from responding to clear employee misconduct. The Act does not protect an employee who makes intentionally false allegations for the purpose of causing another employee to wrongfully lose his job. The Judge's rationale penalizes an employer that undertakes a full and fair investigation and seeks to treat an offending employee the same as others who engaged in similar wrongdoing. The Act does not protect Charging Party's misconduct. The Act does not prevent Respondent from ensuring that misconduct does not happen again. The Act does not support the Judge's decision, and the Board should reverse it.

Respectfully submitted this 29th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2020 a true and correct copy of the foregoing Nestlé USA, Inc.'s Brief in Support of Exceptions to Administrative Law Judge's Decision, upon the following:

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